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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PEPPER SCHULTZ,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
UNITED STATES OF AMERICA, et al.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION OF INTERVENOR-RESPONDENT COMSTOCK BROADCASTERS,INC.

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Respondent Comstock Broadcasters, Inc.[1] ("Comstock"), Intervenor-Respondent, respectfully requests that this Court deny the Petition for a writ of

[1] There is no parent or subsidiary corporation of Comstock Broadcasters, Inc. *See* Pet. App. 259a-276a.

certiorari filed herein on August 23, 1991, to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 21, 1991.

JUDGMENTS AND OPINIONS BELOW

The judgment of the court of appeals (Pet, App. 1a-2a) is an unreported decision pursuant to Local Rule No. 14. The memorandum opinion and order of the Federal Communications Commission (Pet. App 172a-177a) is reported at 5 FCC Rcd 3273 (1990).

JURISDICTION

The judgment *per curiam* of the court of appeals (Pet. App. 1a-2a) was entered on March 21, 1991. The order of the court of appeals denying rehearing (Pet. App. 1a) was entered on May 29, 1991. The petition for a writ of certiorari was filed on August 23, 1991. The jurisdic-

tion of this Court is invoked under 28 U.S.C. §1254(1).

COUNTERSTATEMENT

The petitioner, Pepper Schultz, sought judicial review of the orders of the Federal Communications Commission, which granted the Application of Intervenor-Respondent Comstock Broadcasters, Inc. ("Comstock") for a new FM radio station in Sparks, Nevada, and denying the mutually exclusive application of the petitioner, Schultz. The Commission, after extensive evidentiary hearings, on the qualifications of both applicants, found that Schultz was not qualified to be the Licensee of the station because he failed to establish that he was financially qualified at the time he filed his application, had not demonstrated that he had a realistic staffing proposal, and had not shown good cause for acceptance

of a late-filed putative curing amendment. (Pet. App. 174a-175a).

With respect to the *ex parte* issue added by the Administrative Law Judge pertaining to the qualifications of Comstock, the Commission agreed with the Review Board's *Decision* (Pet. App. 134a-171a) that, while a violation of the *ex parte* rules had occurred, the conduct in question was not so egregious as to warrant the disqualification of Comstock (Pet. App. 171a; 175a-176a).

Schultz appealed the Commission's orders to the United States Court of Appeals for the District of Columbia Circuit, pursuant to 47 U.S.C. §402(b). Upon review of the orders and the briefs filed by each party, and after hearing oral argument, the court of appeals affirmed, without opinion, the orders of the Commission, stating, *per curiam* that

"appropriate disposition of the appeal does not warrant a further opinion" beyond that set forth in the Commission's *Memorandum Opinion and Order* released May 30, 1990. (Pet. App. 2a). The court of appeals further denied Schultz's petition for rehearing.

Schultz, who was represented by counsel in the proceedings below, now files the subject petition for writ of certiorari *pro se*.

ARGUMENT

I. THE ISSUES RAISED BY PETITIONER ARE NOT PROPERLY BEFORE THIS COURT.

The primary thrust of the petition is to convince this Court to grant certiorari on issues neither raised by the petitioner in the proceedings below nor decided by the court of appeals.

Petitioner's first Question (Pet. App. ia), while obscure, purportedly

challenges the orders of the Review Board and the Commission declining to grant Schultz's post-designation amendment, on constitutional grounds. While Schultz did contend he was entitled to amend his application to meet a disqualifying issue under existing precedent, he, at no time claimed that he had a constitutional right to do so. In any event, the question of whether Schultz could offer purported curing amendments for glaring deficiencies in his application was discussed and deliberated at length through the course of two hearings, two Review Board Decisions, and two Commission orders. The issue of whether Schultz was entitled, under existing Commission precedent, to amend his application was presented to the court of appeals, which affirmed the Commission's order without opinion. Petitioner offers no reason or

argument in his petition why that judgment should be disturbed.

Second, Petitioner raises for the first time the question whether the FCC's policy on minimum staffing of proposed broadcast facilities violates a now-repealed provision of the Communications Act of 1934, as amended,[2] or otherwise violates the Due Process Clause of the 5th Amendment, and/or the 9th Amendment to the Constitution. Not having raised such issues in the proceedings below, the Petitioner failed to exhaust administrative and judicial remedies potentially available to him, and should be estopped from raising them before this Court.

Petitioner's third Question seeks to have this Court rule on whether Petition-

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[2] 47 U.S.C. §506 [deleted by Public Law 96-507, 94 Stat. 2747, Dec. 8, 1980]. Former §507 was renumbered §506 pursuant to the same Public Law.]

er, or any party similarly situated, may seek redress from the government, in the form of damages for "unfair Judicial practice and procedures, perverse humor and regulation of Commerce..." While Petitioner has complained of being treated unfairly in proceedings below, this is the first time he has asserted a right of recovery for alleged economic injury. Any claim against the United States for such injury is governed by the Tort Claims Act,[3] and must be initiated in federal district court or the U.S. Court of Claims. This Court does not have original jurisdiction in such matters. Moreover, Petitioner is attempting to set the cart before the horse: He must first demonstrate to this Court what he has so far failed to demonstrate to the Review

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[3] 28 U.S.C. §1436(b).

Board, the Commission, and the court of appeals, *i.e.*, that he was treated unfairly, before he can even begin to argue that alleged errors in the adjudicative process below amounted to tortious conduct by employees of the United States.

Petitioner's fourth Question misstates the action taken by the Review Board and the Commission, and accordingly, is not genuinely in issue: No dissent was posted to the Decision of the Review Board that, under existing Commission precedent, disqualification of Comstock for a violation of the *ex parte* rules, was not warranted.[4] Since the issue raised is based upon a faulty premise, it is not properly before this Court.

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[4] *See* (Pet. App. 171a; 175a-176a)

Petitioner's fifth Question appears to suggest that the rights of natural persons are superior (or, at least, not inferior) to the rights of corporate entities in being compared under established criteria for the award of governmental licenses to use the radio spectrum. This question was neither raised, nor decided in any of the proceedings below, and the Petitioner should be precluded from raising it at this very late date.

Petitioner's sixth Question poses no question of fact or law that was at issue before the court of appeals. The Commission found that there had been a violation of the Commission's *ex parte* rules by Comstock, but that such conduct was isolated, and, under existing precedent, not disqualifying. Comstock did not appeal that conclusion to the court of

appeals, and the question of whether or not the *ex parte* rules had been violated was not before the court of appeals, and cannot be made an issue here. Comstock, by failing to appeal the finding of a violation to the court of appeals, has elected to accept that finding as a given, and there is no point in wasting this Court's time over matters about which no controversy exists.

What *was* at issue before the court of appeals was whether the Commission erred, or otherwise abused its discretion, in not imposing on Comstock a sanction more severe than a simple reprimand. The Commission clearly set forth its reasons for not disqualifying Comstock, and the court of appeals affirmed. The Petitioner does not raise any issue concerning the appropriateness of the sanction imposed on Comstock, however.

Petitioner's seventh and final Question is merely a restatement of Question 3, and is not properly before this Court for the reasons stated above.

II. THE ISSUES DECIDED BY THE COMMISSION AND THE COURT OF APPEALS DO NOT WARRANT REVIEW BY THIS COURT.

As stated in Rule 10 of the Rules of this Court, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Neither the questions specified by the Petitioner, nor the issues actually decided by the court of appeals raise special and important issues warranting review.

Petitioner does not contend, nor is Counsel for Intervenor-Respondent aware, of any decision by any other United

States court of appeals in conflict with the Judgment rendered by the court of appeals below.[5] No federal question decided by a state court of last resort is at issue here.[6]

This is not a case of first impression which should be settled by this Court; rather, the issues presented and resolved are matters frequently dealt with by the Respondent federal agency.[7] And, while Petitioner cites to three past

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[5]The failure of the court of appeals to issue its own opinion, but instead, to state it was satisfied with the reasons given by the Commission in its Memorandum Opinion and Order, cannot be considered to be so far a departure from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's power of supervision (*see* SUP. CT. RULE 10.1(a)). *Per Curiam* decisions are common enough, and the court of appeals is to be commended for not expending needless human and natural resources in unnecessary repetition of the Commission's own rationale.

[6]SUP. CT. RULE 10.1.(b).

[7]*Id.*, RULE 10.1(c).

decisions of this Court,[8] none of them have even the remotest connection with or application to the facts of this case, and certainly could not be said to be in conflict with the decision of the court of appeals below.

Peper v. Fordyce, *supra*, involved a procedural question of how costs of court should be divided when it was found that the United States court of appeals in that case was without jurisdiction. Nowhere in his verbose, yet highly cryptic petition does the Petitioner explain what this case has to do with the instant case. Schultz seems to argue that both he, and perhaps Comstock as well, may be

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[8]*Peper v. Fordyce*, 119 U.S. 469 (1886) (reprinted at Pet. App. 221-224a); *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940) (reprinted at Pet. App. 225a-233a); *United States v. Petrillo*, 332 U.S. 1 (1947) (reprinted at Pet. App. 234a-251a).

entitled to redress for legal fees (Pet. p. 9). Schultz not only confuses "costs of court" with "legal fees," but fails to recognize (a) that it is not the government, but the losing party, that ordinarily pays court costs, and (b) that the premise for this Court to exercise discretion in directing who pays costs is totally missing in this case: The court of appeals *did* have jurisdiction over the appeal of Petitioner under 47 U.S.C. §402(b), and Petitioner, who brought the appeal, can hardly be heard now to complain that the court of appeals was without jurisdiction to decide the dispute.

FCC v. Sanders Brothers Radio Station, *supra*, decided two important questions of federal law under the Communications Act: *first*, that adverse economic impact upon an existing broadcast licensee is not a separate and independent

ground for the Commission to refuse to grant an application for a new station which would compete economically with, but not cause electrical interference to, that existing licensee; and *second*, that, while private economic injury, in the absence of any evidence that the public interest would be harmed, may be inadequate, as a basis for denying an application for a new station, it is not inadequate, as a basis for conferring standing on a person or entity to seek review of the Commission's action in the court of appeals, under 47 U.S.C. §402(b)(2). Neither economic injury, due to competition from a new station,[9] nor

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[9]Both Petitioner and Comstock are competing for the same frequency for a new station. No party is asserting here that the community of Sparks, Nevada, or the greater metropolitan area of Reno, Nevada, cannot sustain, economically, the addition of another radio station.

lack of standing to seek review of a Commission order is at issue here.

Finally, Petitioner cites to *United States v. Petrillo, supra*, apparently for the proposition that the federal government may not constitutionally require an applicant for a broadcast construction permit or license to meet minimum standards of staffing a proposed station before it will grant such application.[10] *U.S. v. Petrillo* stands for no such proposition. At issue, in that case, was the facial validity of a [former] provision in the Communications Act[11] to make criminal attempts to coerce radio broadcast licensees, by force, violence, intimidation or duress to employ persons beyond the number *actually needed* by the station

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[10](Petition, p. 9 "B").

[11]47 U.S.C. §506 [since repealed; *see* note 1 *supra*.]

to perform necessary work. A majority of this Court sustained this anti-"feather-bedding" provision as the legitimate exercise of Congress' power to regulate interstate commerce. This Court did *not* therein hold that it was either illegal or unconstitutional for the federal government to hold licensees to minimum standards of staffing and finances so as to assure that the proposed station would operate in the public interest. The *Petrillo* case is therefore totally inapposite.

As to the *constitutional* question purportedly raised by the Petitioner, such questior was *not* raised in any of the proceedings below, and Petitioner is foreclosed from raising it at this late date. The public interest rationale behind such minimum standards—ensuring that the station would be operated by a

sufficient number of personnel so as to guarantee that obligations of a broadcast licensee to operate according to the technical terms of its license, and meet its public service obligations to its community of license, is clearly a legitimate and constitutional end of the power of government to regulate interstate commerce.

Nor did Petitioner, in the proceedings below contend that the Commission was misapplying its own precedent which established minimum standards of station staffing. But, precedent or no, the Commission had a statutory mandate to regulate in the public interest, and for it to approve of a proposal that, *on its face* was inherently incapable of effectuation, would have been a clear violation of that statutory obligation.

Petitioner includes in his Appendix, other materials the relevance and probity of which are neither explained nor justified. While there is no RULE prohibiting the inclusion of totally immaterial information in an appendix to a petition for writ of certiorari, Comstock objects to consideration of any such material by this Court in connection with its deliberations over whether or not to grant the writ.[12]

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[12]Because the Petitioner does not even allude to these materials in the body of his petition, let alone explain their relevance to this case, Comstock has been placed somewhat in the position of shadow-boxing-trying to anticipate possible bases for their reasonable inclusion, and responding thereto. While the better policy might be to ignore these materials completely, since Petitioner did, Comstock is mindful of this Court's injunction in RULE 15.1 that respondents have an obligation to the Court to point out any perceived misstatements of fact or law set forth in the petition which would have a bearing on the question of what issues would properly be before this Court if certiorari were granted.

For example, Petitioner includes, at Pet. App. 259a-276a the articles of incorporation and other corporate documents of Intervenor-Respondent, Comstock. No issue has ever been raised, let alone decided, concerning the *bona fides* of Comstock's corporate status in the State of Nevada, and it is both irrelevant and inappropriate to include such documents in the appendix to the petition.

Second, Petitioner includes the corporate charter of another Nevada corporation, and some newspaper articles pertaining to that corporation. (Pet. App. 276a-290a) Petitioner does not explain for what purpose these materials are included in his appendix. The relevance of the corporate documents is totally lacking as are the newspaper articles, which, in addition, constitute impermissible hearsay,

Petitioner also includes in his Appendix a letter from Comstock's principal Robert Carroll to Comstock's Counsel of Record, which was shared with Petitioner's then communications counsel. This letter, contrary to Petitioner's self-serving introductory statement, is *not* public information, but a confidential letter which was shared with Counsel for the Petitioner in an effort to reach a settlement of the case. Public policy frowns on the use of statements made in the context of settlement discussions,[13] since the law encourages settlements of legal disputes, thus eliminating the need for costly hearings and expenditure of public and private resources. Awareness that statements made in the context of a

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[13] *See* 4 WIGMORE ON EVIDENCE, §§1061, 1062; C.J.S. EVIDENCE, §§285-290; MCCORMICK ON EVIDENCE, 2d Ed. §§74, 274 (West, 1972).

settlement discussion might be later made public would cause self-censorship and hamper sincere efforts by parties to reach compromise. Although the substance of the letter from Comstock's principal to Comstock's counsel is innocuous and immaterial to any issue raised or decided in proceedings below, Comstock objects strongly to its inclusion in the Petitioner's appendix, because it constitutes a breach of the confidence with which it was shared with Petitioner's counsel, *i.e.*, as an offer of compromise to settle the litigation, and Comstock respectfully moves that it be stricken.[14]

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[14]Should this Court decline to strike this portion of Petitioner's Appendix, and, instead, to consider it relevant in disposing of the instant Petition, Comstock would respectfully request that this Court note that the settlement offer conveyed therein was rejected by Schultz, and thereafter withdrawn.

Finally, Petitioner, offers (1) an entry allegedly appearing in BROADCASTING YEARBOOK, 1990, which implies that Comstock is the holder of a construction permit for the FM station in Sparks, Nevada, and (2) a sworn statement by James E. Elliott, dated *circa* May 24, 1991, that Comstock principal Bob Carroll telephoned him sometime in January, 1991 and asked him if he were interested in investing and being part of the management of Comstock's new radio station, that Carroll had obtained a construction permit from the FCC, and hoped to have the proposed station on the air in early 1991. (Pet. App. 293a).

The relevance of this material is not apparent. Petitioner should be aware that orders of the Federal Communications Commission are not automatically stayed by the filing of an appeal with the Unit-

ed States court of appeals. Petitioner never requested a stay, and, accordingly a construction permit was issued to Comstock on September 12, 1990. The permit did state that issuance was "conditioned on the final outcome of the notice of appeal, case number 90-1318, filed June 22, 1990 by Pepper Schultz," and that "any construction undertaken" by Comstock in the interim was "at its own risk."

To summarize, Petitioner has presented no question of law or fact which either requires, or is even appropriate for disposition by this Court. No purpose would served by granting the petition and issuing the writ; the expeditious denial of the petition would avoid further delay in a proceeding that is approaching ten years in duration.

CONCLUSION

For the foregoing reasons, the petition of Pepper Schultz for writ of certiorari should be denied.

Respectfully submitted,

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